



Ep. 8: What Employers Need to Know About COVID-19 Vaccination Requirements and Testing

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Host: Welcome to RumbergerKirk's Legally Qualified podcast, where we answer important questions facing businesses today and discuss hot topics in the legal industry, from employment law to commercial litigation, product liability, and everything in between. We've got it covered.

Sally Culley: Hello everyone. Thank you for joining us today for this episode of Legally Qualified. I'm Sally Culley. I'm a partner in RumbergerKirk's Orlando office, and my practice is in employment law and commercial litigation.

Chase Hattaway: And I'm Chase Hattaway. I am also a partner in RumbergerKirk's Orlando office, and I also practice employment law.

Sally Culley: So about a year ago, Chase you and I discussed COVID vaccine mandates on one of our earlier episodes of Legally Qualified, and our conversation mostly related to the ADA and Title 7 because those were the laws at the time that pertained to an employer's ability to require employees to receive the vaccine. However, it's now been a year and things have changed. There's been an explosion of legal issues

regarding mandating COVID vaccines. The job market is certainly different, and there are new laws to discuss.

So we thought it might be a good idea to chat again and talk about what's the same, what's new and then we'll pull out the crystal ball and see what we can expect to happen in the future. So Chase, let's start by talking about the ADA and Title 7. What's the status of the ADA and the Title 7 requirements for COVID vaccines? Has anything changed since last time we talked?

Chase Hattaway: Generally speaking I think the legal requirements regarding the ADA and Title 7 are basically the same. Employers still have to consider providing accommodations to employees who can't receive the vaccine because of a disability or a sincerely held religious belief. Now over the past year I think that we've seen this play out in maybe a different way than we anticipated.

So with disability requests, these are kind of easy to handle. You get a doctor's note. The employer gets a doctor's note, and in that case it's pretty safe to assume that there is a legitimate health condition that requires an accommodation. With employers requiring employees to receive the vaccine though, many employers have seen a huge surge in employees requesting accommodations based on their religious beliefs.

And these can be tricky to evaluate. With a religious request the employee simply says that they have a religious belief, and the employer can't ask for follow up information unless they have an objective basis to question the sincerity of the religious belief. So this gets really murky, and most employers probably don't want to be in a position where they're questioning their employee's religious beliefs.

So our view and our recommendation has been that the safe approach is usually to assume that the employee's claim to religious belief is sincere and then move to the second step, which is determining whether an accommodation exists that allows

the employee to do their job safely without getting vaccinated. So I guess to answer your question, the bottom line is that the law is generally the same. But I think these issues have played out a little bit differently than we may have expected a year ago.

The last thing that I'd mention though is that the EEOC has updated its guidance a few times over the past year, and the general guidance has been the same. But there have been some noteworthy changes and developments as we've progressed through different phases of this pandemic.

Sally Culley: Speaking of updated guidance from the EEOC, one of our associates, Shenele Pettis Bright and I, recently wrote an article regarding the EEOC updated guidance as it pertains to long haul COVID-19. For those that are interested, you can find that article on RumbergerKirk's website. I won't go into great detail since you can read it there, but the bottom line is that long haul COVID can under certain circumstances be considered a disability under the ADA and trigger those protections.

This is a really important thing for employers to know. So I would recommend that employers be familiar with the EEOC technical guidance and also keep abreast of the updates. And by the way, speaking of articles, you can also find several COVID related articles written by Chase Hattaway on the RumbergerKirk website.

So switching gears a bit, one thing we have to talk about is what's been in the news so much. The Supreme Court's rejection of OSHA's rule requiring large employers to mandate that their employees either be vaccinated or be tested weekly for COVID. Chase, can you explain to us what happened with that?

Chase Hattaway: Yeah, absolutely. So I'll start with the background for listeners who may not be familiar with what led up to this decision. So in September of 2021 President Biden announced that the Department of Labor would issue an emergency rule requiring all employers with at least 100 employees to ensure their workforce was fully vaccinated or providing weekly negative tests. Two months later OSHA issued an

emergency temporary standard or what we call an ETS, that basically did that and it did a lot of other things as well.

Not surprisingly there were a lot of legal challenges, and ultimately these were consolidated before the Sixth Circuit Court of Appeals and the case eventually made its way up to the Supreme Court. And just recently the Supreme Court issued a rule and ruled that the OSHA ETS exceeded OSHA's authority. So the majority opinion and the Supreme Court decision focused on the text of the Occupational Health & Safety Act, which is a law from which OSHA derives its authority.

The allows the Secretary of Labor to establish, and I'm quoting here, "workplace safety standards, not broad public health measures." And it also states that OSHA is charged with regulating, quote, unquote, occupational hazards. So the Supreme Court held that COVID-19 is a public hazard that exists in many areas of life, not an occupational hazard that is specific to the workplace. So ultimately the court ruled that the OSHA ETS exceeded the scope of OSHA's authority.

Now the OSHA rule that was struck down received a lot of attention. But there was probably a little less attention given to another rule in which the Supreme Court upheld federal legislation requiring certain employees to receive the vaccine. So the background is, in November of 2021 the Secretary of the Department of Health and Human Services required facilities participating in Medicare and Medicaid to ensure that their covered staff were vaccinated against COVID-19.

Now that's a lot of words. But the bottom line is, there were a ton of medical facilities that had to require their employees to receive the vaccine. Like the OSHA rule, there were various challenges made. Unlike the OSHA rule however, the Supreme Court held that the HHS has the authority to promulgate this rule. The Supreme Court in its decision noted that HHS is tasked with ensuring that healthcare providers who care for Medicare and Medicaid patients protect their patient's health and safety.

The court also observed that COVID-19 is, quote, unquote, highly contagious and quote, dangerous and is especially dangerous for Medicare and Medicaid patients.

So ultimately the Supreme Court concluded that this requirement to get vaccinated, quote, unquote, fits neatly within HHS's grant of authority. So the two cases before the Supreme Court, one vaccine mandate promulgated by OSHA was struck down. The other promulgated by HHS was upheld.

Sally Culley: Okay, so for those taking notes listening to this podcast, I'm going to see if I can identify the key takeaways from all of that. Number one, healthcare facilities that accept funding from Medicare or Medicaid are to require employees to be vaccinated. Number two, the OSHA rule requiring large employers to mandate that their employees either be vaccinated or get tested weekly, is no longer in effect. And number three, regardless, any employer that wants to require proof of vaccination has to comply with Title 7 in the ADA. Did I get all that right?

Chase Hattaway: That's a mouthful, but I think you got it.

Sally Culley: Okay, then. So that covers the federal landscape, but what about the states? Obviously we have seen states and other local municipalities take very different approaches—sometimes inconsistent approaches—regarding proof of vaccination. Do employers need to also worry about state laws?

Chase Hattaway: Absolutely, and like you said, many states have different laws, which makes this really difficult for businesses operating in many states. So we use Florida, for example, because that's where we practice. Florida recently passed a law that allows employers to require employees to receive the vaccine. But requires these employers to provide exemptions to the policy in five situations, and these are the five situations.

Number one, the employee has a health concern that includes pregnancy or anticipated pregnancy. Number two, if the employee provides a statement that the employee declines the vaccine because of a sincerely held religious belief. And by the way, I think there's going to be a different analysis than Title 7. Number three, that the employee has immunity based upon prior infection. Number four, if the employee provides a statement that the employee will comply with regular testing at no cost to the employee. And then number five, if the employee provides a statement from the employee that the employee will comply with an employer's reasonable written requirement to use employer provided personal protective equipment.

So these carve out provides various ways that employees can avoid employer's vaccine mandate policies. Florida also has a vaccine passport ban, and I think this is something that some employers need to also consider. Originally when this vaccine passport ban came out, I don't think that we really thought this applied to employers wanting to require employees to receive the vaccine. But then the Florida Department of Health levied a \$3.5 million fine against Leon County for requiring its employees to get vaccinated.

Now I still don't think that the vaccine passport ban restricts a private employer's ability to require employees to receive the vaccine. But I do think that public employers need to be thinking about this law in addition to the other new legislation when considering a vaccine mandate policy.

Sally Culley: And underlying all of these legal issues are some very real day-to-day, practical personnel issues that employers have to face.

Chase Hattaway: Yeah, you know, employees have really strong opinions on these things. I think a lot of employees are adamantly opposed to their employer requiring them to get the vaccine. I think other employees are adamantly opposed to working in an office

where other employees around them aren't vaccinated. And the reality is, it's really hard to please both sides of that.

In addition, the job market's also really tight. Employers are having a hard time finding employees. Employers are having a hard time retaining employees. And so a COVID mandate policy is going to add an extra layer of difficulty. Sally, you're an employer lawyer, but you're also our administrative partner here in Orlando. And I'm sure when you took over that role a few years ago you never thought that you'd be navigating some of the personnel and office issues we've gone through over the last two years. But I'm curious, what have you seen on some of the personnel issues in both your capacity as a lawyer representing employers and also as our administrative partner?

Sally Culley:

It has really been a unique couple of years that's for sure. It can be really hard for employers to balance their desire for a healthy and safe workplace against their need to hire and retain good employees and have employees who are happy and productive. So Chase, I think you hit the nail right on the head there, that you may have some employees that are going to quit if they are required to get a vaccine or others that may refuse to wear a mask. On the other hand, some employees will quit if they don't feel like their employers are taking every step possible to protect them from getting COVID. Social distancing isn't always possible depending on what type of work a company does. And an employee with COVID can lead to several other employees needing to quarantine, which could affect productivity.

And we thought we were past the hard part. Everyone thought they were getting back to normal, and then the Omicron variant has made it harder even for employers to strike the right balance. In our office, for example, we have gone back to encouraging people to work from home until we've gotten past the current surge of COVID. And we can do that because we got used to doing that way back when in the early stages of COVID. But other businesses, especially smaller ones, may have a more difficult time switching to remote work.

So what I've found is that it's important for employers to be flexible and implement strategies and policies that work for their particular businesses, while doing their best to keep their employees as safe as possible. And of course employers need to keep an eye on trends and new laws so that they can comply with those things. So let's talk about what we can expect in the future. Chase, what do you think the future holds on this issue as we move into, can you believe it, the third year of the pandemic?

Chase Hattaway: It is crazy that we're in our third year, and I think as we go into the third year, one of the biggest developments is going to be the Omicron variant and the effect that that's going to have on employers and specifically employers trying to get their employees vaccinated. I think that since the beginning there's been a lot of employees who were pushing back against their employer requiring them to get vaccinated. And what we've seen over the last few weeks is that people who are vaccinated and boosted can still contract COVID-19 and spread COVID-19.

And so I think with this new development, employees who were already a little bit on the fence with their employers requiring them to get vaccinated, I think those employees are going to be even more skeptical when it comes to those types of rules. Now all of that being said, I think there's obviously good reasons for people to get vaccinated and to get boosted. And I think there's also good reasons for employers to want their employees to get vaccinated. It's obviously good for the employees because it's going to keep them safe, and it's going to reduce the symptoms if they do contract COVID-19, and there's also good business reasons.

So even if an employer decides that it doesn't want to or can't require employees to receive the vaccine, I think employers can absolutely still encourage their employees to get vaccinated.

Sally Culley: I think that it'll be interesting to see what happens with the OSHA rule. Will it be revised to be more narrow? Or will it be targeted to a specific industry? Or maybe it's just going to be dropped altogether. There's also midterm elections this year, which could lead to new legislation, which way that legislation goes of course is going to depend on which party has control of Congress.

Chase Hattaway: Yeah, regardless of what happens, we'll be watching and providing updates as things evolve. It's certainly going to be an interesting year.

Sally Culley: Well, that's one thing we can all agree on. Thank you so much Chase for joining me in discussing these key issues employers should consider when developing policies about vaccine requirements. I also want to thank our listeners for joining us today. I hope you found our conversation helpful and insightful. If you have any questions about requiring vaccination or any other employment concerns, you can email us at info@rumberger.com.

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